

## REMARKS

Claims 1, 4-6, 8, 12, 13, 15, 23, 26-29, 31, 35, 36, 41-47, 50, 52, 54, 57, 59, and 61 are amended and claims 7, 30, 40, and 55 are cancelled herein. Claims 1, 4-6, 8-13, 15, 16, 23-29, 31-39, 41-54, and 57-61 will be pending in this application upon entry of this amendment.

The final Office Action mailed December 10, 2008 has been carefully reviewed and the following remarks have been made in response.

### Claim 1

Amended claim 1 is directed to a breath testing device housing for a breath tester. The housing comprises:

- a base to be gripped by an operator and having a front edge and an opposite back edge;

- a display oriented on the front edge of the base;

- a mouthpiece interface for receiving a removable mouthpiece, said mouthpiece interface being oriented with respect to said base such that when the operator stands in front of the subject and a subject blows into the mouthpiece, said display is in the direct line of view of the operator and not in the direct line of view of the subject;

- the mouthpiece interface comprising a generally U-shaped channel sized to receive the mouthpiece therein, the mouthpiece being configured to be pivotally coupled with respect to the mouthpiece interface;

- a manual sample button located on the back edge of said base opposite the display;
- and

- an alcohol sensor fluidly connected to the mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece.

Claim 1 is patentable over U.S. Patent No. 6,468,222 to Mault et al. (hereinafter referred to as “Mault”) in view of U.S. Patent No. 6,319,199 to Sheehan et al. (“Sheehan”), U.S. Patent No. 4,233,842 to Raemer et al. (“Raemer”), and U.S. Patent No. 3,880,591 to Burroughs (“Burroughs”) in that, whether considered alone or in combination, these references fail to teach or suggest a breath testing device housing that includes 1) a display oriented on *the front edge* of the base, 2) a manual sample button located on *the back edge* of said base opposite the display, and 3) a mouthpiece interface comprising a *generally U-shaped channel* sized to receive a mouthpiece therein, the mouthpiece being configured to be pivotally coupled with respect to the mouthpiece interface.

Mault describes a calorimeter 10 for measuring the metabolic rate of a subject and includes, among other configurations, a mouthpiece 20 (or mask 17) and a display 18 on the opposite side of the calorimeter from the mouthpiece. As seen in FIG. 2 of Mault, the display is located on a generally planar surface of the calorimeter 10.

The Office has taken the position that Mault discloses a calorimeter having a display (18) on an *edge* thereof. See page 10 of the final Office action. However, the display of Mault is on a generally planar surface of the calorimeter and not an edge. Claim 1 recites that the display is oriented on the front edge of the base and Mault clearly does not teach or suggest this feature. None of the other references teach or suggest this feature of claim 1 nor does the Office assert that they do.

The Office has also taken the position that Mault discloses an actuator (i.e., power button 16) being located on an edge of the calorimeter. See page 10 of the final Office action. As seen in FIG. 2 of Mault, however, the power button 16 is located on a top, planar surface of the calorimeter. Thus, the power button of Mault is not located on an edge as recited in claim 1. Accordingly, Mault fails to teach or suggest this feature of claim 1. None of the other references teach or suggest this feature nor does the Office assert that they do.

As illustrated in Figure 1 of the present application, which shows an exemplary embodiment of the claimed breath testing device, sidewalls 20, 22 of the base converge to define a front edge 24 and a back (or rear) edge 26. A display 72 is oriented on the front edge 24 and a manual sample button 76 is located on the back edge. As explained in Applicants’

specification, a housing with a base having front and back edges, a display on the front edge and a manual sample button on the back edge, as recited in claim 1, is better for the operator, easier to grip, and easier to operate than conventional breath testing devices.

Sheehan describes a portable data collection device for diagnosing data, specifically, configured for insertion into a patient's ear canal. Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that "[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel." *See* Raemer, Column 6, lines 54-57.

Burroughs describes a breath testing device having a tubular inlet and a mouthpiece including a cup-shaped receiver member and a stem member. As illustrated in FIG. 2 of Burroughs, the stem member couples the cup-shaped receiver member to the breath testing device. The tubular inlet of Burroughs, which the Office has characterized as corresponding to the claimed mouthpiece interface, is circular in cross-section and not generally U-shaped as recited in claim 1. None of the other references teach or suggest this feature nor does the Office assert that they do.

Accordingly, for at least the reasons set forth above, Claim 1 is submitted to be patentable over Mault in view of Sheehan, Raemer, and Burroughs. Claims 4-6 and 8-12 depend from independent Claim 1 and are likewise patentable over Mault in view of Sheehan and further in view of Raemer and Burroughs.

### Claim 13

Amended claim 13 is directed to a mouthpiece for a breath testing device for testing the breath of a subject. The mouthpiece comprises a body having a first end and a second end, said first end being open so that the subject can blow air into said mouthpiece, said second end being closed, said mouthpiece further comprising at least one port for channeling air blown into said mouthpiece into the breath testing device, and a discard breath outlet oriented such that discard breath is not directed into the device or at an operator of the breath

testing device during testing, said mouthpiece having a cross-sectional shape being one of: a D-shaped cross-sectional shape and a V-shaped cross-sectional shape.

Claim 13 is patentable over U.S. Patent No. 4,274,425 to Lutz et al. ("Lutz") in view of Mault because, whether considered alone or in combination, these references fail to teach or suggest a mouthpiece for a breath testing device as is recited in Claim 13. More specifically, neither Lutz nor Mault, considered alone or in combination, describes or suggests a mouthpiece that includes a discard breath outlet oriented such that discard breath is not directed into the device or at an operator of the breath testing device during testing. Accordingly, Claim 13 is submitted to be patentable over Lutz in view of Mault.

The Office states on page 3 of the final Office action that Mault discloses a breath testing device having a discard breath outlet 72 that discards breath away from the operator. However, claim 11 recites that the mouthpiece has a discard breath outlet oriented such that discard breath is not directed into the device or at an operator of the breath testing device during testing. One exemplary embodiment of a mouthpiece 12 having a discard breath outlet 110 is illustrated in FIG. 7 of the present specification. Mault does not disclose such a mouthpiece. That is, Mault does not disclose a mouthpiece having a discard breath outlet oriented to divert breath of the subject from the device and the operator. Lutz also fails to teach or suggest such a feature.

As a result, claim 13 is patentable over Lutz in view of Mault. Claims 15 and 16 depend from independent Claim 13 and are likewise patentable over Lutz in view of Mault.

#### Claim 23

Amended claim 23 is directed to a breath tester housing assembly for a breath tester. The housing assembly comprises:

a housing comprising a base, a display, and a mouthpiece interface, said base being adapted to be gripped by an operator during testing, said display being oriented with respect to said housing to be in line with an operator's direct line of view while gripping said base;

a mouthpiece configured to be removably coupled to said mouthpiece interface, said mouthpiece comprising an elongate body comprising at least one substantially planar surface, an open end, and a closed end, the closed end and substantially planar surface of the mouthpiece being placed against the mouthpiece interface in a testing position; and

an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece.

Neither Mault nor Raemer, whether considered alone or in combination, teaches or suggests a breath tester housing assembly as is recited in Claim 23. More specifically, neither Mault nor Raemer teaches or suggests a breath tester housing assembly that includes a mouthpiece configured to be removably coupled to said mouthpiece interface, said mouthpiece comprising an elongate body comprising at least one substantially planar surface, an opened end, and a closed end, the closed end and substantially planar surface of the mouthpiece being placed against the mouthpiece interface in a testing position.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that “[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel.” *See* Raemer, Column 6, lines 54-57. Thus, Mault and Raemer fail to teach or suggest a breath tester housing assembly wherein the closed end and substantially planar surface of the mouthpiece are placed against the mouthpiece interface of the housing in a testing position as recited in Claim 23.

Accordingly, Claim 23 is submitted to be patentable over Mault in view of Raemer. Claims 24-29 and 31-35 depend from independent Claim 23 and are likewise patentable over Mault in view of Raemer.

Claim 47

Amended Claim 47 recites a mouthpiece for a breath testing device. The mouthpiece comprises a first end, a second end, and a body extending therebetween, a portion of said body having a selected cross-sectional shape, said selected cross-sectional shape being one of: a D-shaped cross-sectional shape and a V-shaped cross-sectional shape, said body further comprising a passageway extending through said body from said first end towards said second end, said passageway for channeling air blown into said mouthpiece into the breath testing device, said mouthpiece being configured to pivotally couple with a breath testing device interface of the breath testing device.

Neither Mault nor Raemer, whether considered alone or in combination, describes or suggests a breath testing device mouthpiece as recited in Claim 47. More specifically, neither Mault nor Raemer describes or suggests a breath testing device mouthpiece that includes a mouthpiece configured to be *pivotaly coupled* with a breath testing device interface. Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that “[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel.” See Raemer, Column 6, lines 54-57.

Accordingly, Claim 47 is submitted to be patentable over Mault in view of Raemer. Claims 48-53 depend from independent Claim 47 and are likewise patentable over Mault in view of Raemer.

Claim 61

Amended Claim 61 is directed to a breath testing device comprising:

a base to be gripped by either hand of an operator and having a front edge and an opposite back edge;

a display oriented on the front edge and configured for alignment with the operator's direct line of view while gripping the base during use of the breath testing device;

a removable mouthpiece extending away from the display, the mouthpiece including at least one port for channeling air blown into the mouthpiece by a subject into the breath testing device and a discard breath outlet oriented such that discard breath is not directed at the operator of the breath testing device during testing when the operator views the display;

a mouthpiece interface for receiving the removable mouthpiece, said mouthpiece being configured to pivotally couple with the mouthpiece interface, the mouthpiece interface and mouthpiece being oriented with respect to the base such that, when the operator holds the base in either hand and stands in front of the subject, and the subject blows into the mouthpiece, the display is not in the direct line of view of the subject; and

an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece.

Neither Mault nor Raemer, whether considered alone or in combination, teaches or suggests a breath testing device housing as is recited in Claim 61. More specifically, neither Mault nor Raemer describes or suggests a breath testing device housing that includes 1) a display oriented on the front edge (as explained above with respect to Claim 1) or 2) a mouthpiece being configured to pivotally couple with the mouthpiece interface (as explained above with respect to Claim 47). Thus, Claim 61 is patentable over Mault in view of Raemer.

Claims 36

Amended Claim 36 is directed to a breath tester housing assembly for a breath tester. The housing assembly comprises:

a housing comprising a base and a display, said base being configured to be gripped by an operator during testing, said display being oriented with respect to said housing to be in line with the operator's direct line of view while gripping said base and while the operator stands in front of a subject in a sideways stance;

a mouthpiece configured to be removably coupled to said housing and to extend obliquely from said housing, said mouthpiece being configured to be pivotally coupled to said housing; and

an alcohol sensor in fluid communication with the mouthpiece, the alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece.

Claim 36 is patentable over Mault in view of Raemer and U.S. Patent No. 5,303,575 to Brown et al. (hereinafter referred to as "Brown") in that neither Mault, Raemer nor Brown, whether considered alone or in combination, teach or suggest a breath tester housing assembly that includes a mouthpiece configured to be removably coupled to the housing and extend obliquely from the housing and wherein the mouthpiece is configured to be pivotally coupled to the housing.

Brown describes an automated unsupervised apparatus for conducting a blood alcohol content level test on an individual. The apparatus includes housing having a display and an opening for receiving a straw. The Office asserts that the straw (24) of Brown extends obliquely from the housing (21). See page 25 of the final Office action. However, nowhere does Brown support this position. As clearly seen in FIG. 1A, the straw extends perpendicularly to the housing and not obliquely. Mault and Raemer also fail to teach or suggest a mouthpiece configured to extend obliquely from a housing.

Moreover, as discussed above with respect to Claim 47, neither Mault nor Raemer teach or suggest a mouthpiece that is pivotally coupled to a housing. Brown also fails to

teach or suggest this feature of Claim 36. Thus, claim 36 is patentable over Mault, Raemer and Brown in that these references fail to teach or suggest a mouthpiece that is pivotally coupled to a housing.

Accordingly, Claim 36 is submitted to be patentable over Mault in view of Raemer and Brown. Claims 37-39 and 41-46 depend from independent Claim 36 and are likewise patentable over Mault in view of Raemer and Brown.

#### Claim 54

Amended Claim 54 is directed to a mouthpiece for a breath testing device. The mouthpiece comprises a body extending between a first end and a second end, said body comprising a first body portion, a second body portion, and a passageway defined at least partially within said first and second body portions, said first body portion extending from said first end to said second body portion, said second body portion extending from said second end to said first body portion, said passageway being substantially concentrically aligned with respect to said body and extending from said first end towards said second end for channeling air blown into said first end into the breath testing device, at least one of said first and second body portions comprises at least one port extending between an external surface of said body and said passageway, said at least one port being defined within said first body portion for channeling discard breath air from said mouthpiece during testing, said at least one port is oriented such that discard breath is not directed towards an operator of the breath testing device during testing.

Neither Mault nor Lutz, whether considered alone or in combination, describes or suggests a mouthpiece for a breath testing device as is recited in Claim 54. More specifically, neither Mault nor Lutz teaches or suggests a mouthpiece that includes at least one port being oriented such that discard breath is not directed towards an operator of the breath testing device during testing. See Applicants' remarks with respect to claim 13.

Thus, Claim 54 is submitted to be patentable over Mault in view of Lutz. Claims 57-60 depend from independent Claim 54 and are likewise patentable over Mault in view of Lutz.

Double Patenting Rejection

Claims 13, 15, 16, 23-27, 47-54 and 57-61 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over Claims 1-7 and 11-29 of U.S. Patent Application No. 11/089,655 to Forrester, Jr. However, U.S. Patent Application No. 11/089,655 has been abandoned thereby rendering this rejection moot.

CONCLUSION

In view of the above, all the claims in this application are in condition for allowance. Applicants request reconsideration and favorable action.

The undersigned respectfully requests a telephone call from the Examiner if a call might expedite the allowance of the application.

The Commissioner is hereby authorized to charge the fee of \$130.00 for a one-month extension, \$810.00 for Request for Continued Examination, and any additional fees in connection with this Amendment B to Deposit Account No. 012384 in the name of ARMSTRONG TEASDALE LLP.

Respectfully submitted,

/Michael G. Munsell/

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Michael G. Munsell  
Registration No. 43,820  
ARMSTRONG TEASDALE LLP  
One Metropolitan Square, Suite 2600  
St. Louis, Missouri 63102-2740  
(314) 621-5070